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September 1, 2005 **HAND DELIVERY**

California Energy Commission
Attn: Docket Unit
1516 Ninth Street, MS-4
Sacramento, CA 95814

Re: Docket 04-IEP-01D, In the Matter of: The Preparation of the 2005 Integrated Energy Policy Report (2005 Energy Report)

Dear Docket Clerk:

Enclosed please find **CONCURRENT BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY** being submitted in the above referenced docket by Pacific Gas and Electric Company.

The Concurrent Brief has also been submitted in electronic format to the Docket Office this date.

Yours very truly,

CHRISTOPHER J. WARNER

CJW:mw

Enclosures

STATE OF CALIFORNIA
Energy Resources Conservation and Development Commission

In the Matter of Preparation of the 2005 *Integrated Energy Policy Report – Appeal of Executive Director's Notice of Intent to Release Aggregated Data*	Docket 04-IEP-01D

CONCURRENT BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY

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September 1, 2005

STATE OF CALIFORNIA
Energy Resources Conservation and Development Commission

In the Matter of the Preparation of the 2005 *Integrated Energy Policy Report-Appeal of Executive Director's Notice of Intent to Release Aggregated Data*	Docket: 04-IEP-01D

CONCURRENT BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY

I. INTRODUCTION

Pacific Gas and Electric Company ("PG&E") hereby files its Concurrent Brief in support of its June 17, 2005, appeal of the California Energy Commission ("CEC") Executive Director's Notice of Intent to Release Aggregated Data ("NOI"). For the reasons stated below and in the concurrent briefs filed simultaneously in this proceeding by appellants Southern California Edison Company ("SCE") and San Diego Gas & Electric Company ("SDG&E"), the NOI is contrary to law and State energy policy, is not supported by substantial evidence in the record, and would be arbitrary, capricious and an abuse of the CEC's discretion.[1/]

After hundreds of pages of testimony and a long day of hearings, there is substantial agreement between the CEC staff and the utilities on the law and facts applicable to the utilities' appeals:

-- The utilities and CEC staff agree that if the information proposed to be released by the NOI is a trade secret, the Commission is barred by the Public Resources Code

1/ PG&E joins in and incorporates by reference into this brief the arguments made by SCE and SDG&E in their respective concurrent briefs. For administrative efficiency and to avoid repetition, PG&E's arguments under the headings below will indicate as appropriate where it joins with identical legal or factual arguments made by SCE or SDG&E in their briefs, and will not repeat those arguments.

and the Public Records Act from releasing the information.[2/]

-- The utilities and the CEC staff agree that the information proposed to be released has been developed by the utilities, is not available to the public, and has not been released to the public or to market participants or competitors through other lawful means.[3/]

-- The utilities and the CEC staff agree that the information proposed to be released has commercial value to third parties, primarily energy suppliers who compete directly with the utilities or who seek to maximize their profits in negotiating energy supply contracts with the utilities.[4/]

-- The utilities and the CEC staff agree that one of the principal reasons the CEC has collected the information and seeks to release it to the public is because the CEC has agreed to provide advice and recommendations to the California Public Utilities Commission (CPUC) in connections with the CPUC's evaluation and regulation of the utilities' electricity procurement plans under section 454.5 of the Public Utilities Code, which requires the CPUC to adopt procedures to protect the utilities' "market sensitive" information relating to their proposed or approved electricity procurement plans.[5/]

-- The utilities and the CEC staff agree that granting the utilities' appeals would not in any way restrict the access of the CEC or CPUC staff or commissioners to the information, nor the access of non-market participants such as TURN or the CPUC's Office

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2/ "Testimony of Kevin Kennedy," July 13, 2005, p. 1; *see also*, "Order Denying Pacific Gas and Electric Company's Appeal of Executive Director Decision Denying Confidentiality," CEC Docket 04-IEP-1D, April 13, 2005, p. 2.

3/ Frayer/CEC, Tr. 252:6- 10; 256:12- 25.

4/ *See, e.g.,* "Testimony of Julia Frayer," July 13, 2005, pp. 13-15, 29; "Rebuttal Testimony of Julia Frayer, Attachments E and F," August 12, 2005; Kennedy/CEC, Tr. 187:22- 188:8.

5/ "Testimony of Kevin Kennedy," July 13, 2005, pp. 1- 2.

of Ratepayer Advocates who agree to comply with an appropriate protective order.[6/]

-- Finally, the utilities and CEC staff agree that granting the utilities' appeals in no way would restrict the ability of the CEC to aggregate and release the data in question on a statewide basis, or on a "North of Path 15" or South of Path 15" basis, or on an annual basis by planning area, for purposes of fulfilling the CEC's energy planning responsibilities.[7/]

These facts and the applicable law lead inexorably to the conclusion that the information and data PG&E and the other utilities seek to protect from release in this proceeding are trade secrets, and therefore the CEC by law must grant the utilities' appeals and protect the information from disclosure to third parties. Moreover, even if the information and data were not trade secrets, the CEC's role as an advisor to the CPUC in the CPUC's procurement proceedings requires the CEC to protect the information from disclosure because the CPUC itself requires the information to be protected under the statutory prohibition on release of "market sensitive information" under Public Utilities Code section 454.5(g). Finally, even if the information were not a trade secret and was not "market sensitive" under section 454.5(g) of the Public Utilities Code, the record in this proceeding demonstrates that release of the information would seriously damage the utilities' current programs to procure electricity for their customers at least-cost and potentially could significantly raise the costs of electricity to the utilities' customers. Moreover, the CEC can fulfill its statutory energy policymaking functions using other publicly available information or by aggregating the utilities' information at a higher level.

6/ "Motion of Joint Parties To Defer Decision on Appeal Pending Further Proceedings in CPUC Order Instituting Rulemaking Relating to Confidentiality of Information," CEC Docket 04-IEP-01D, August 22, 2004, p. 4.

7/ "Preliminary Comments of SCE, PG&E and SDG&E On Energy Commission Proposal to Aggregate Information," CEC Docket 04-IEP-01D, May 20, 2005, p. 3.

Therefore, under the California Public Records Act,[8/] the public interest served by not disclosing the information "clearly outweighs" the public interest served by disclosing the information.

II. AS A MATTER OF LAW, PG&E'S INFORMATION THAT IS THE SUBJECT OF THIS APPEAL IS A TRADE SECRET THAT THE CEC MUST KEEP CONFIDENTIAL

The NOI's proposal to release the utilities' confidential information is governed by the Public Records Act. The Public Records Act establishes the general principle of public access to information and the right of the public to inspect any public record, subject to certain exceptions. (Govt. Code section 6253.) One of the exceptions to the Public Records Act's disclosure requirement is for "trade secrets." (Govt. Code sections 6254(k), 6254.7(d).) In turn, both the Evidence Code and the Civil Code give owners of trade secrets the right to protect those trade secrets from disclosure. (Evid. Code section 1060; Civ. Code section 3526 *et seq.*)

In particular, the Uniform Trade Secrets Act, enacted in California, defines a "trade secret" as:

> "...information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure for use; and
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Civ. Code section 3426.1(d).) Public Resources Code section 25322, part of the CEC's authorizing statute, applies the "trade secret" exemption in the Public Records Act to the CEC.

Here, the information PG&E seeks to protect from disclosure satisfies all the criteria for definition as a "trade secret." The information has been developed solely by PG&E as part of its

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8/ Govt. Code section 6255(a).

business planning and forecasting function, and has been reasonably maintained by PG&E as secret. The information has not been disclosed to the public or third parties, either as part of this proceeding or a separate proceeding, except under protective orders at the CPUC in the procurement proceeding. The information clearly "derives independent economic value" by reason of its non-disclosure to the public or to energy suppliers and other electricity market participants and competitors who have affirmed that they can obtain economic value from its disclosure.[9/] In fact, the testimony by the CEC staff witnesses in this proceeding repeatedly and without exception declared that the information would be valuable to energy suppliers and other third party market participants and competitors in making investment and commercial bidding decisions in their own businesses. For example, CEC witness Frayer went to great lengths in her prepared and oral testimony to demonstrate that energy suppliers would derive value and benefit from the information for purposes of bidding in the utilities' procurement proceedings and for making investment decisions relating to supplying electricity.[10/]

The only testimony and arguments by the CEC staff against classifying this information as a "trade secret" were based on the irrelevant assumption that if third parties or the public could obtain from other sources information that was *similar but not identical* to the information owned by the utilities, then the utilities' information would not be a trade secret.[11/] However, the CEC staff witnesses contradicted themselves by agreeing that the "similar" information was not the "same information" that the utilities had developed, and by testifying that even if the "similar" information was available to the public, the utilities' information was still

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9/ Kelly/IEP, Tr. 360:14- 361:9.

10/ "Testimony of Julia Frayer," July 13, 2005, pp. 13- 17, 29; Frayer/CEC, Tr. 211:21- 215:10.

11/ *Id.*, p. 11.

economically valuable to third parties because those third parties could not obtain the "same" information elsewhere or would have to pay other commercial entities a fee to develop the information on their own.[12/]

Contrary to the CEC staff testimony, the existence of a "trade secret" is not disproved by evidence that third parties have access to "similar" information or can develop "similar" information on their own. The essence of a trade secret is exactly as the Uniform Trade Secrets Act defines it: information which has independent economic or commercial value to the owner or to third parties, and which the owner has reasonably maintained as secret. That is all that is needed to demonstrate the existence of a trade secret, and there is no evidence in the record that demonstrates otherwise.

Moreover, the utilities introduced extensive evidence showing that disclosing the information would adversely affect the utilities' competitive position and negotiating leverage in procuring electricity for their customers, and potentially drive up costs to their customers as a result.[13/] PG&E's testimony in particular demonstrated that its ability to negotiate the lowest reasonable prices and other beneficial terms and conditions in its current "requests for offers" for long-term electric energy and capacity could be severely compromised by release of the NOI information.[14/] The CEC staff did not dispute that disclosure of the information might put the utilities at a competitive or negotiating disadvantage, but used a "higher good" argument to justify the harm to the utilities and their customers.[15/] But the problem with the "higher good"

12/ *Id.*, pp. 13, 15- 16.

13/ See, e.g., "Testimony of Roy Kuga," July 13, 2005; "Declaration of James Shandalov," March 1, 2004; "Rebuttal Testimony of Roy Kuga," August 12, 2005.

14/ Kuga/PG&E, Tr. 127:25' 136:20; Shandalov/PG&E, Tr. 136:25- 193:13.

15/ "Testimony of Kevin Kennedy," July 13, 2005, p. 5.

argument is that it is irrelevant to whether the information is a "trade secret" or not; once a "trade secret" is established, the CEC is prohibited from disclosing it in this proceeding.[16/]

III. EVEN IF THE INFORMATION WERE NOT A TRADE SECRET, THE COMMISSION IS PROHIBITED FROM DISCLOSING IT UNDER PUBLIC UTILITIES CODE SECTION 454.5(G) AND CPUC RULINGS IMPLEMENTING PG&E'S PROCUREMENT PLANS

Even if, *arguendo*, the information in the NOI were not a "trade secret" under California law, the CEC is separately and independently prohibited from releasing the information pursuant to Public Utilities Code section 454.5(g) and CPUC rulings implementing section 454.5(g) and PG&E's procurement plans.

Public Utilities Code section 454.5(g) provides:

> "The commission shall adopt appropriate procedures to ensure the confidentiality of market sensitive information submitted in an electrical corporation's proposed procurement plan [etc.]."

(Publ.Code section 454.5(g).) In its procurement plan proceedings under section 454.5.(g), the CPUC has issued several rulings agreeing that information that is the same or substantially similar to the information at issue here, should be and will be protected from disclosure to the public or market participants, except under appropriate protective orders. ("Administrative Law Judges' Ruling Regarding Confidentiality of Information and Effective Public Participation," CPUC Docket No. R.01-10-024, April 4, 2003; "Administrative Law Judges' Ruling on Protective Order and Remaining Discovery Disputes," CPUC Docket Nos. R.04-04-003 and R.04-04-025, May 9, 2005; "Administrative Law Judges' Ruling on Remaining Discovery Disputes," CPUC Docket Nos. R.04-04-003 and R.04-04-025, August 19, 2005.) In a related ruling issued July 9, 2004, the CPUC found that the CEC itself was acting as "advisory staff" to

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16/ The relevance and credibility of the "higher good" argument where the information is not a "trade secret" or "market sensitive" is discussed in Section IV of this brief, below.

the CPUC in the procurement proceedings, and therefore was bound by the same confidentiality ruling applicable to other parties under section 454.5(g):

> "Essentially this means that the CEC's staff is functioning like the Commission's own advisory staff for purposes of this proceeding. As with past models [footnote omitted] of interagency collaboration, it is a 'given' that the CEC will honor any confidentiality claims that are ultimately upheld by the assigned ALJs in this proceeding and will ensure that any confidential or privileged documents are exempt from public disclosure under its regulations for confidential designation (Cal. Code Regs., tit. 20, section 2501 et seq.)."

("Administrative Law Judge's Ruling Regarding Access of Collaborative Staff to Long-Term Plans and Supporting Testimony," CPUC Docket No. R.04-04-003, July 9, 2004, pp. 1- 2.).

The CPUC and CEC have endorsed the role of the CEC as an "advisor" to the CPUC in its procurement proceedings, and both have affirmed that the IEPR proceedings are the proceedings in which the CEC will fulfill its advisory and "collaborative" function.

> "Today we begin a close collaboration between our two agencies in the adoption of long-term resource plans for electric utilities and resource adequacy issues identified in this Rulemaking....In particular, as already acknowledged in the CPUC's January long-term procurement decision, the CPUC intends to coordinate the timing of investor-owned utility long-term plan review to dovetail with the Energy Commission's Integrated Energy Policy Report (IEPR) responsibilities outlined in SB 1389. Work is already underway to utilize the 2003 IEPR results in the utilities' 2004 long-term plans."

("Joint Opening Statement of CPUC President Michael Peevey and CEC Commissioner John Geesman," CPUC Docket No. R.04-04-003, April 30, 2004. Thus, based on the CPUC ruling subjecting the CEC to the same rules on confidentiality as currently apply at the CPUC to the information that is the subject of the utilities' appeals, the CEC is prohibited from releasing the information. Specifically, the CPUC rulings preclude or do not require release of categories of utility information that are identical to or substantially the same as the information sought to be

released here. There remains some confusion between the CPUC and CEC regarding whether planning area and bundled customer quarterly energy remains protected at the CPUC, but PG&E believes that the system-level information and adjustment methodology required to be disclosed by the recent CPUC ruling is not the same information as proposed to be disclosed by the NOI in this proceeding.[17/]

These CPUC rulings demonstrate that the information in the NOI is "market sensitive" information which must be protected from release under section 454.5(g). However, even in the absence of these CPUC rulings, the utilities have provided abundant, uncontradicted evidence in the record that the information in the NOI indeed is "market sensitive" and therefore should be protected under section 454.5(g).

For example, PG&E's witness Roy Kuga, one of PG&E's lead officers responsible for procurement of electricity for PG&E's customers on a "least cost" basis, testified:

> "Telling the market exactly how much is needed would give suppliers an unfair advantage in pricing the last increment needed, especially when suppliers are not required to disclose their own cost information nor required to bid their own cost....[The NOI would] provide market participants who are selling to the utilities with data about the buyer's (utility's) open position, strategy and requirements, thus placing the competitive advantage in the hands of the sellers....In other functioning markets one entity does not disclose its open position to another market participant for the market to work....In fact, if all parties know the exact position and strategies of an individual market participant in isolation with no other entity required to disclose its position that will undermine that participant's ability to get a fair and competitive price or fairly negotiate at arms length in the market."

(Testimony of Roy M. Kuga, July 13, 2005, pp. 2- 3.) PG&E witness James Shandalov, whose

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17/ "Administrative Law Judges' Ruling on Remaining Discovery Disputes," CPUC Docket Nos. R.04-04-003 and R.04-04-025, August 19, 2005, pp. 6- 7; "Administrative Law Judges' Ruling on Protective Order and Remaining Discovery Disputes," CPUC Docket Nos. R.04-04-003 and R.04-04-025, May 9, 2005, pp. 26- 27.

background included "real world" work for energy suppliers selling electricity in California's power markets, testified that the NOI information would be considered by energy suppliers and marketers to be "market-sensitive" and valuable for the purposes of their bidding and negotiating strategies with the utilities. (Testimony of James D. Shandalov, March 1, 2004, paragraphs 10, 13, 17, 19, 21; Shandalov/PG&E, Tr. 137:18 – 139:13, 179:22 – 180:2.) The witnesses for the other utilities reaffirmed these conclusions, as summarized in the briefs of SCE and SDG&E, incorporated by reference herein.

Moreover, PG&E witness Kuga testified that PG&E is also a seller of significant amounts of surplus power at different times during the year, in direct competition with the very suppliers who would be taking advantage of PG&E's confidential information in their sales to the same markets at the same time. Thus, release of the NOI information would give PG&E's direct competitors an unfair advantage in those surplus sales markets, to the detriment of both PG&E and its customers:

> "PG&E is a very active participant in the market, both as a buyer and as a seller. In fact, there are times where we actually sell more than we buy. And that's pursuant to least-cost dispatch principles, pursuant to the CPUC.... And the aggregation proposal from staff, in our opinion, provides enough information to the marketplace that we believe gives them an indication of our needs or our surplus position with the quarterly disagrregation.... And so any indication that gives the marketplace any insight as to what PG&E's supply position is, or what our short position is, we believe is going to result in additional costs to our customers."
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> Kuga/PG&E, Tr. 128:15- 20, 24- 25, 129:16- 20.

In response, the CEC staff witnesses argued that information similar to the NOI information was available elsewhere[18/] or was routinely disclosed by utilities outside

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18/ "Testimony of Michael Jaske," July 13, 2005, pp. 6- 7; "Rebuttal Testimony of Julia Frayer, Attachments E, F and G", August 12, 2005.

California[19/] or was information that would lead to better decisions by energy suppliers on where and when to invest in new power facilities in California.[20/] But the first two arguments are irrelevant to whether the information is "market sensitive" and the third argument actually affirms the market sensitivity of the information. That similar information is available elsewhere or is routinely disclosed by other utilities outside California does not support the conclusion that the information in *this* proceeding and in *these* California energy markets is not market sensitive, i.e. of interest in the market and capable of affecting market behavior. On the other hand, by testifying that the information in the NOI *is* valuable to energy suppliers in California energy markets and *would* affect the suppliers' decisions to invest in or bid to provide electricity supplies to California utilities, the CEC staff witnesses have demonstrated persuasively that the information indeed would affect energy markets in California and thus is "market sensitive" and prohibited from disclosure within the plain meaning of section 454.5(g).

PG&E anticipates that in response to the evidence that the CEC is playing an "advisory" and "collaborative" role in the CPUC proceedings, and therefore bound by CPUC rulings under section 454.5(g), the CEC staff will argue that as the "originating" agency for the procurement planning information to be used in the IEPR and the CPUC's procurement proceedings, the CEC is not bound by section 454.5(g) or CPUC confidentiality rulings, and is free to apply its own confidentiality standards to the information. But that argument is "too clever by a half;" the joint rulings by the CPUC and CEC on the IEPR and procurement plan proceedings make abundantly clear that the two agencies are pursuing one and the same public policy objective under their respective statutes: assuring that the utilities procure adequate and reliable suppliers of electricity

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19/ "Testimony of Michael Jaske," July 13, 2005, pp. 4- 6.

20/ "Testimony of Julia Frayer," July 13, 2005, pp. 13- 19, 26- 29.

for their customers at reasonable prices in fulfillment of a unified, single California energy policy. The form of the two agencies enabling statutes does not change their basic substantive identity: the Public Resources Code and Public Utilities Code both mandate that the Energy Commission and Public Utilities Commission achieve the same overall energy policy goals for the State. This salient fact in and of itself should end the debate.

IV. EVEN IF THE INFORMATION IS NEITHER A TRADE SECRET, NOR MARKET SENSITIVE, THE CEC CAN SATISFY ITS ENERGY PLANNING AND PUBLIC INTEREST RESPONSIBILITIES WITHOUT DISCLOSING THE INFORMATION, AND THEREFORE THE INFORMATION MAY NOT BE DISCLOSED UNDER THE PUBLIC RECORDS ACT "BALANCING TEST"

For the reasons stated by Southern California Edison in sections III and IV of their concurrent brief, which PG&E joins and incorporates by reference herein, the public interest would be more harmed if the NOI information were forced to be disclosed, compared to the harm to the public interest that the CEC staff argues would occur if the NOI information is not disclosed. Therefore, the Public Records Act "balancing test" requires the CEC to protect the information from disclosure, and it would be arbitrary, capricious and an abuse of the CEC's discretion if it were to reject the utilities' appeals and order otherwise.

In this regard, PG&E believes that the testimony of the CEC staff's principal witness, Ms. Julia Frayer, on the harm that would allegedly occur if the NOI information were not disclosed, is simply not credible. On cross-examination, Ms. Frayer conceded that her conclusion that new electricity supplies will not be available and prices to consumers will go up if the NOI information is not released, was "very strong," was intended to be "more hypothetical," and possibly should have been corrected to "would not or may not" rather than "will." (Frayer/CEC, Tr. 272:2- 4; 273:1- 5.). Frayer also agreed that, if the existing information already provided by the utilities in their long-term procurement contract "requests for offers"

("RFOs") allowed for six months of further response and negotiations by suppliers after the "RFOs" were issued, then the RFOs themselves would provide the "competitive benefits" that the CEC staff alleged would only be available if the NOI information were released to those suppliers. (Frayer/CEC, Tr. 276:2- 20.)

But even assuming the CEC staff's theory of "competitive benefits" has some merit, does it logically lead to the conclusion that the harm to utilities and their customers of disclosing the NOI information is offset by the competitive benefits?

The answer is no. PG&E has attempted to replicate the logic of the CEC staff's argument in order to evaluate this "competitive benefits" vs. "customer and utility harm" argument. The CEC staff's logic seems to be:

First, the supply of electricity in California is relatively inelastic over the short term, such as over the next three years, but is relatively elastic over any period beyond three years.

Second, the entry of new suppliers into California electricity markets beyond a three year period is hindered by the inability of smaller suppliers to obtain the same information on utility demand and resource needs as larger suppliers can obtain.

Third, in order to "level the playing field" between existing suppliers and new entrants and enhance competition among suppliers, the utilities should be required to make available to all electricity suppliers their confidential electricity demand forecasts that are the basis of their current "requests for offers" that they are actively pursuing at the present time for multi-year electricity contracts in California electricity markets.

Fourth, the utilities and their customers will not suffer harm from disclosure of their confidential procurement plans and forecasts, because any loss of negotiating or bargaining leverage in their current negotiations with suppliers will be offset by the utilities' ability to

terminate or limit any resulting contracts so that they can purchase cheaper supplies from new suppliers who enter the market within a period of four or five years after the current contracts have been executed.

Unfortunately, the CEC staff's logic suffers from multiple fallacies, all of which come under the famous dictum of John Maynard Keynes: "In the long run, we are all dead." First, there is no credible evidence that new electricity suppliers can or will enter California markets within the short period of time assumed by the CEC staff during which the utilities' current procurement solicitations are pending. Given the collapse of the merchant generating sector and the credit crisis faced by the remaining electricity suppliers to the California market, it is clear that new market entrants are unlikely to enter the California market in the next few months unless they are already large, established creditworthy players and unless they are able to obtain long-term bilateral contracts with the utilities outside of the utilities' current solicitations. Second, it seems far-fetched to assume, as the CEC staff does, that the utilities can (a) simply limit their portfolios and current contracts to short-term procurement contracts (3 years or less), and (b) then terminate those contracts and enter new contracts after three years, in order to offset the harm caused by existing suppliers at the margin who use the utilities' confidential information in the utilities' current procurement solicitations to price gouge during the years it takes for new suppliers to enter the market.

The 2000- 2001 energy crisis was not caused by utilities' over-reliance on long-term contracts, it was caused by the lack thereof, and the whole, over-arching goal of California's energy policy ever since has been to incent the utilities to diversify their electricity portfolios with an adequate and balanced level of long-term, mid-term and short-term contracts. That is what PG&E is pursuing, *right now, in current electricity markets,* with its long-term RFOs for

conventional and renewable capacity and energy. And if PG&E simply revealed all its residual net short information to existing suppliers in those long-term RFOs now, with the hope that any price gouging under the 10, 15 and 20 year contracts resulting from those RFOs would be offset by newer suppliers later entering the market, we and our customers "in the long run would be dead." The severe damage to PG&E's current negotiating position in its current solicitations for energy and capacity in electricity markets – in the "real world," not the "theoretical" world postulated by the CEC staff witnesses – would result in higher prices and less competitive terms and conditions for PG&E's customers in the short-term and long-run.

Thus, under close scrutiny based on the realities of California's current electricity procurement markets, the alleged "competitive benefits" described by the CEC staff in support of the NOI simply evaporate into nothing. With no or little benefits to support the NOI, and with the ability of the CEC to fulfill its statutory and collaborative energy planning responsibilities with other, publicly-available information or through appropriate protective orders as endorsed by the CPUC, the Public Records Act "balancing test" requires that the CEC reject the NOI and protect the NOI information from disclosure.

V. DISCLOSURE OF THE INFORMATION WOULD BE ARBITARY AND CAPRICIOUS BECAUSE IT WOULD EXPOSE THE UTILITIES TO INCONSISTENT AND CONFLICTING REGULATION BY THE TWO LEAD AGENCIES IN THE STATE RESPONSIBLE FOR ENERGY POLICY

Prior to the single day of hearing on the utilities' appeals, the utilities filed a motion requesting that the CEC defer acting on the appeals and the NOI until the CEC and the CPUC could coordinate and consolidate their confidentiality policies relating to electricity procurement through the process currently underway in the CPUC Order Instituting Rulemaking on confidentiality. ("Motion of Joint Parties to Defer Decision on Appeal Pending Further Proceedings in CPUC Order Instituting Rulemaking Relating to Confidentiality of Information,"

August 22, 2005.) In their joint motion, the utilities pointed out the high risk that if the CEC and CPUC move forward with inconsistent and contradictory rules and standards on protection of confidential information, disputes pending at both agencies regarding confidential information could result in protracted, burdensome litigation and a patchwork of inconsistent requirements that would demand even more time and effort to understand, untangle and apply. The CPUC's own proposed rulemaking on confidentiality, currently pending and in which most of the parties in this proceeding are participating, makes clear that the CPUC itself wishes to promulgate a comprehensive, balanced policy on confidential information that will apply to all current and future electricity procurement plans and that will avoid or narrow future disputes and litigation.

In contrast, the "ad hoc" approach represented by the NOI, which itself has generated labor-intensive and burdensome litigation and dispute, is needless and irrational. Moving forward with the NOI at this time when the same issues are pending before the CPUC in proceedings in which the CEC has promised to collaborate, would be arbitrary and an abuse of the CEC's obligation to regulate rationally and fairly. Instead, the CEC should put this dispute and the NOI on hold, grant the utilities' Joint Motion, and move forward in a collaborative fashion with the CPUC to establish comprehensive and consistent confidentiality policies in this proceeding and the CPUC confidentiality rulemaking proceeding.

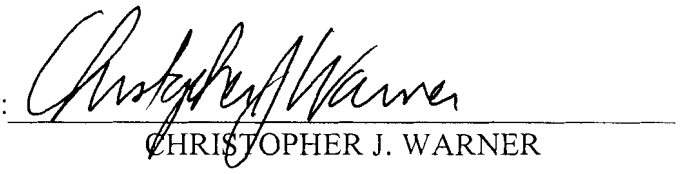
VI. CONCLUSION

The Executive Director's NOI is legally flawed, not supported by the record in this proceeding, and unnecessary in order to achieve the goals of the Energy Commission. Approval of the NOI would damage the utilities and their customers, and adversely affect California's electricity markets during this sensitive period of recovery from the energy crisis. The CEC staff's claims of benefits to the NOI are unsupported and contradicted by the record, and the NOI

itself would be inconsistent with confidentiality policies and standards already in place at the CPUC. For all these reasons, the appeals of PG&E and the other utilities should be granted.

Respectfully Submitted,

CHRISTOPHER J. WARNER

By: 
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September 1, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **"CONCURRENT BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY"** by

•• transmitting an e-mail message with the document attached to each party on the official service list for Docket 04-IEP-01D hereby listed below.

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